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Supreme Court, U.S.
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No. 04-894

# In the Supreme Court of the United States

MICHAEL CZICHRAY,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

## MR. CZICHRAY'S REPLY TO THE GOVERNMENT'S BRIEF IN OPPOSITION TO HIS PETITION FOR CERTIORARI

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The criminal law has always been about disputes of fact and how to resolve them. The defendant's version is for the trier to accept or reject. Police testimony in conflict with the defendant's is not sacrosanct. The fact finder here, an experienced District Court Judge, was in the best position to believe one witness over another, and to weigh the inferences that flow from what is said by each side.

The Solicitor acknowledges Czichray's claim "is fact bound," Brief at p. 9, yet does not recognize what the facts were found to be. The District Court, weighing the "credibility of their narrators," Thompson v. Keohane, 516 U.S. 99, 110 (1995), ruled the patina of Mr. Czichray's testimony shined, while the F.B.I. rendition was dim at best. The agents lied when initially contacting Czichray at 4:30 a.m., lied at 6:00 a.m. as to how long they planned to stay at his home, and then made Czichray himself lie when calling his business to say he would be out for the day. Thus it was a small step for the District Court to find that having lied about the little things, the Agents were not candid as to the big question.

Which was whether Czichray's belief that he was in custody was reasonable. Stansbury v. California, 511 U.S. 318, 325 (1994). It was the kind of decision the law requires a Judge to make day in and day out.

Who was telling the truth? Somehow, someway, someone has to decide. Judge Tunheim accepted his duty, and rejected the F.B.I.'s testimony. He could do it, and he did it.

The Solicitor's elegant brief does not come to terms with the District Court's finding that the Agents' assurances the interview was non-custodial, while perhaps said, were lacking in sincerity. (JRT Order I at p. 7). A constellation of factors – their control of his home, the phone line, access to bathroom, and their willingness to threaten the viability of his

business – undercut the Agents' platitudes their interview was without restriction, hence non-custodial.

The Solicitor surprisingly claims that there is not "a single inconsistency between the facts as found by the District Court and as recited by the Court of Appeals," and that the dispute concerns only the legal "significance" thereof. Brief at p. 15. Yet the key fact was hotly disputed: whether Czichray reasonably believed he was in custody. A-10. That finding had to be made and was. "The Court concludes that under the totality of the circumstances, a reasonable person in Czichray's position would not have believed that he was free to terminate the interview and ask the Agents to leave." A-45. And to make that finding, Judge Tunheim had to situate himself in Mr. Czichray's "shoes." Thompson, 516 U.S. at 119 (J. Thomas, joined by C.J. Rehnquist, dissenting).

It's a finding, too, not easily disturbed on an appeal. This Court should be careful with the Solicitor's claim that "any asserted conflict with Thompson is illusory." Brief at p. 15. If the Thompson standard of review is to be applied to direct appeals, as the Eighth Circuit has here and in other cases, e. g. United States v. Axsom, 289 F.3d 496, 500 (8th Cir. 2002), then Judge Tunheim's finding that Mr. Czichray was reasonable in his thought process is presumed correct, consistent with the habeas case law. Yarborough v. Alvarado, 124 S.Ct. 2140, 2150 (2004). In the alternative, his finding is entitled to complete deference because, as an historical fact, it is founded upon a credibility determination, an exercise in which appellate courts do not engage. Thompson, 516 U.S. at 110. Either way, the standard of review could not be ignored by the Eighth Circuit, which found Czichray's belief was unreasonable based upon the assurances of F.B.I. agents whose credibility was found lacking.

On the merits, Beckwith v. United States, 425 U.S. 341 (1976) left open the question presented here, whether, in a defendant's abode, government agents may talk and behave in such a way to "bring about confessions not freely self-determined." Id. at 347-348. Since Beckwith, this Court has consistently held a home is a special place with heightened protections against government intrusion. E. g. Kirk v. Louisiana, 536 U.S. 635, 638 (2002). It's anomalous that federal agents are prohibited from seizing a home without a warrant, Payton v. New York, 445 U.S. 573, 576, 590 (1980), but are permitted, by the Eighth Circuit's opinion, to occupy Mr. Czichray's house for hour after hour, sweeping about for their security, rendering Mr. Czichray isolated and powerless inside the place he is supposed to own. The moment the Agents walked through the door at 6:00 a.m. to begin their camp out, Mr. Czichray was unfree.

The Solicitor claims other Circuits have "routinely held that the individual is not in custody" during an in-home interrogation, Brief at p. 11 (citing United States v. Nichnianidze, 342 F.3d 6, 14 (1st Cir. 2003) (forty-five minute interview); United States v. Parker, 262 F.3d 415, 419 (4th Cir. 2001) (thirty minute interview); United States v. James, 113 F.3d 721, 727 (7th Cir. 1997) (place of business interview; short duration). Likewise, the Solicitor argues that since Mr. Czichray was informed he could leave, the cases have said he was not in custody. Brief at p. 11 (citing United States v. Wolk, 337 F.3d 997, 1006 (8th Cir. 2003) (statement obtained during a thirty minute search); United States v. Hayden, 260 F.3d 1062, 1066 (9th Cir. 2001) (two interviews the first twenty minutes long, the District Court finding defendant's version of facts did not "ring true"), cert. denied, 534 U.S. 1151 (2002), and United States v. Menzer, 29 F.3d 1223, 1232-1233 (7th Cir.) (prison interview where defendant obviously could not leave), cert. denied, 513 U.S. 1001

(1994). But none of these decisions come close to seven hours. None began with deceit. And none featured a factual finding that the defendant was truthful in his perception, and it was reasonable for him to think the way he did.

The case is ripe for review. E. g. United States v. Sabri, 541 U.S. 600 (2004) (decision on the government's pretrial appeal).

## CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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